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429104—57

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 1024

MORRIS WEXLER AND ANNABELLE WEXLER,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (Pet. 5–13) are not reported. The opinion of the Court of Appeals (Pet. 14–17) is reported at 241 F. 2d 304.

JURISDICTION

The judgment of the Court of Appeals was entered on February 25, 1957. (Pet. 17.) The petition for a writ of certiorari was filed on May 23, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the Tax Court, on a record supporting its findings of a substantial amount of unreported gambling income, deprived the taxpayer of his property without due process of law by saying, in passing, in its opinion that "one whose income is derived from operations or activities on what might be called the 'fringe of society' should make a far greater effort than other taxpayers to keep every record * * * of his financial transactions * * *."

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

For present purposes the Tax Court's findings of fact (Pet. 6–9) may be summarized as follows:

The taxpayer[1] owned and operated a race wire service for the benefit of bookmakers and a racing stable during the years in question. (Pet. 7.)

In 1949 taxpayer placed bets of several hundred thousand dollars with a bookmaker by the name of William J. Griffiths of Barberton, Ohio. A part of the bets placed by taxpayer were on his own behalf and a part were bets which he placed for one Luke Smith, a so-called betting commissioner of Rochester, New York. When a bet was placed with Griffiths, it was recorded on a daily betting sheet. Such sheets showed the name of the person making the bet, the name of the horse, the amount of the bet, and the amount, if any, won. Griffiths settled his accounts with the various bettors by cash payments, by certified checks made out to fictitious payees, or by so-called switches among such bettors. (Pet. 7–8.)

During 1949 Smith also placed bets with Griffiths directly. For the year 1949, Griffiths' daily betting sheets showed total wins for taxpayer of $386,945, total losses of $328,840, and net wins of $58,105. Griffiths' betting sheets on the days when both taxpayer and Smith placed bets showed total wins for taxpayer of $386,945, total losses of $193,340, and net wins of $43,815. Smith testified that only in unusual circumstances would he have placed bets through taxpayer on those days when he was placing them directly with Griffiths. (Pet. 8, 10.)

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[1] Morris Wexler is hereinafter referred to as the taxpayer, his wife being included as a party merely because joint returns were filed.

Whatever records taxpayer maintained of either his personal betting activity or his betting activity on behalf of others were destroyed. (Pet. 8, 15; R. 26a.)[1]

The Commissioner of Internal Revenue determined that the net wins of $58,105 reflected on Griffiths' daily betting sheets for 1949 were taxpayer's net winnings for the year and constituted additional taxable income to him. The Commissioner further determined that taxpayer won a $150 baseball bet in 1949 which also had not been reported as income in that year. (Pet. 8, 13.)

The Tax Court, after making an adjustment for $10,635 in lay-off bets (Pet. 7), found that the taxpayer had unreported gambling income of "not less than $40,000" (Pet. 13), giving the taxpayer the benefit of a differential of $7,470 ($58,105 less $10,635 equals $47,470), presumably to take care of any possibility that a portion of the total winnings might have belonged to other persons. The Tax Court also upheld the Commissioner's determination that there was an additional $150 in income realized in 1949 by the taxpayer from a baseball bet. (Pet. 8–9, 13.)

The Court of Appeals for the Sixth Circuit, in affirming the Tax Court's decision, noted that the "case turns essentially on questions of fact upon which the Tax Court made detailed findings which are supported by the record." (Pet. 15, 17.)

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[1] Record references are to the Appendix to the taxpayer's brief filed in the Court of Appeals.

ARGUMENT

The taxpayer attempts to raise a constitutional question which is not presented by this case. In his brief before the Court of Appeals (p. 4) he argued that the Tax Court reached a conclusion of law that persons "on the fringe of society" should make a far greater effort than other taxpayers to maintain records of their financial transactions, and that since the taxpayer did not do this the finding of unreported gambling income of $40,000 was justified. Also, in his petition, taxpayer asserts that the Tax Court found him to be a person "on the fringe of society" (Pet. 3) and therefore held that a more stringent burden of proof should be imposed upon him than is imposed on other taxpayers (Pet. 2–3). It is clear from the record (Pet. 5–9), however, that the Tax Court did not make such a finding or reach such a conclusion of law. While it is true that in its opinion (Pet. 12) the Tax Court made the passing remark that one whose income is derived from activities on what might be called the "fringe of society" should make a far greater effort than other taxpayers to keep every record of his financial transactions to substantiate the correctness of his returns,[3] it is clear from a study of

[3] The trial judge stated (Pet. 12) that this remark had been made before but the only reference to such a statement that we have been able to find in the reports of the Tax Court is in *Holl* v. *Commissioner*, decided September 22, 1953 (1953 P-H T. C. Memorandum Decisions, par. 53,314). In that case, which was decided in favor of the taxpayer who was a numbers operator, the Tax Court observed in its opinion that while, "With-

the instant record that the Tax Court imposed no greater burden of proof upon the taxpayer here than would be imposed upon any other taxpayer no matter what his occupation or calling.

As the court below pointed out (Pet. 16), Section 54 (a) of the Internal Revenue Code of 1939 and Treasury Regulations 111, Section 29.54–1 required the taxpayer to keep permanent records sufficient to enable the Commissioner to determine the correct amount of his income subject to the tax. Since taxpayer's records were destroyed, the Commissioner, under Section 41 of the Code, was authorized to compute the amount in such a way as, in his opinion, clearly reflected taxpayer's income. It has long been established that the burden of proving that a deficiency thus determined is wrong rests on the taxpayer. *Interstate Transit Lines* v. *Commissioner*, 319 U. S. 590, 594. Moreover, the Tax Court on a petition for redetermination is authorized to modify the findings and decision of the Commissioner (*Blair* v. *Oesterlein Co.*, 275 U. S. 220), and its findings are conclusive if supported by the record. Here it is clear that the Tax Court's findings of unreported gambling and betting income of $40,150 were justified, not because of taxpayer's failure to keep records, but, because, in

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out question, petitioner should have retained the daily-player tickets" and "should make a far greater effort than other taxpayers to keep every record * * *", his summary records were accurate and his testimony forthright. In considering the taxpayer's demeanor as a witness and the completeness of his available records it is obvious, as here, that no special burden of proof was imposed on that taxpayer.

the words of the Sixth Circuit's opinion, they were "sustained by ample evidence" (Pet. 16) and "supported by the record" (Pet. 15). Having failed to meet even the ordinary burden of proof that was his, it is clear that the Court of Appeals for the Sixth Circuit was not called upon to comment upon the taxpayer's contention that he should not be subjected to a special burden of proof which he erroneously asserted was imposed upon him by the Tax Court.

CONCLUSION

The issue determined below was factual in nature and there is no conflict of decisions. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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